United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2068

To be argued by:
STEPHEN M. LATIMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELMORE CUNNINGHAM, ERNEST ISON III, EDGAR WILLIAMS and CHARLES GOLL, and All Others Similarly Situated at Auburn Correctional Facility,

Appellants,

-against-

BENJAMIN WARD, Commissioner, New York State Department of Correctional Services, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility and Their Subordinate Employees,

Appellees.

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P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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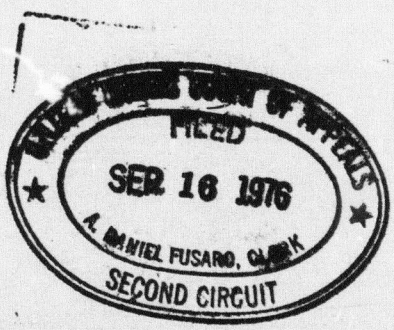

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TABLE OF CASES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
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ELMORE CUNNINGHAM, ET. AL.,

Appellants,

No. 76-2068

-against-

BENJAMIN WARD, ET. AL.,

Appellees.

APPELLANTS' BRIEF

PRELIMINARY STATEMENTS

Appellants brought an action pursuant to 42 U.S.C., 1983 in the United States District Court for the Northern District of New York alleging that they had been keeplocked[1] as punishment for minor disciplinary infractions without the hearing required by Wolff v. McDonnell, 418 U.S. 539 (1974).

1. "Keeplock" means confinement to the prisoner's cell for twenty-three hours a day and loss of rights and privileges identical to those attendant on placement in a segregation or special housing unit.

The case was dismissed by the Honorable Edmund Port without a hearing and without requiring the defendants to respond. The prisoners appeal, contending that keeplock as punishment is a substantial deprivation of liberty requiring the protections of the due process clause of the Fourteenth Amendment.

ISSUES PRESENTED

1. Must a State prisoner be afforded a hearing with advance written notice of charges, the right to call witnesses, and a written statement of the action taken, the reasons therefor; and the evidence relied on before he is confined to his cell under conditions approximating those found in solitary confinement?

2. Is confinement to one's cell under conditions approximating those in solitary confinement as punishment for minor infractions disproportionate to the offense, thus violating the Eighth Amendment prohibition against cruel and unusual punishment?

STATEMENT OF THE CASE

A. Prior Proceedings

Appellants, prisoners at Auburn Correctional Facility, filed a pro se complaint alleging, as a class action, that the Adjustment Committee at Auburn places inmates in keeplock for periods of up to two weeks without being given advance written notice of the charges, the opportunity to present witnesses in

their own behalf, and a written statement of the disposition and the evidence relied. They seek an injunction among other things, prohibiting the Adjustment Committee from imposing serious punishments without the requisite due process hearing. (11-A).

Judge Port dismissed the complaint holding that the Wolff procedures "were not to be required for the imposition of lesser penalties than loss of good time or solitary confinement." (Emphasis in original) (46). Plaintiffs filed a timely Notice of Appeal (49). Counsel was assigned to represent Appellants pursuant to order of this court dated July 12, 1976.

B. Statement of Facts

Construing the complaint liberally Haines v. Kerner, 404 U.S. 519, 520-21 (1972), Plaintiffs allege that prisoners at Auburn are keeplocked by theprison's Adjustment Committee as punishment for disciplinary infractions, and that keeplock is a substantial deprivation of liberty (11-A). Plaintiffs allege that Adjustment Committee procedures that fall far short of the constitutional required safeguards in that they are given no advance notice, oral or written, are not permitted to call witnesses, and are not given a written disposition (10).

Edgar Williams was keeplocked for ten days for carrying a thermos bottle full of hot water (7) Charles Goll was keeplocked for seven days for carrying a briefcase with a

flap on it (8). Elmore Cunningham was keeplocked for three days before an Adjustment Committee hearing for having a nude picture on the wall of his cell (8). He was eventaully given a thirty-day suspended sentence. In none of these cases were the prisoners given the protections required by Wolff v. McDonnell, supra.

ARGUMENT

POINT I

A STATE PRISONER MUST BE AFFORDED A FULL WOLFF HEARING BEFORE HE IS CONFINED TO HIS CELL AS PUNISHMENT

A. The Issues Presented Here Have Been Left Open by the Supreme Court

In Wolff v. McDonnell, 418 U.S. 539 (1974), the United States Supreme Court held that before a major change in the conditions of his confinement could be inflicted on a prisoner as punishment for misconduct, he must be given advance written notice of the charges; an opportunity to present witnesses and documentary evidence in his own behalf; and a written statement of the reasons for the disciplinary action taken and the evidence relied on. The court held that these protections apply when loss of good time may result or "when solitary confinement is at issue," 418 U.S. at 571-72 N. 19, but did not necessarily apply when lesser penalties such as loss of privileges were inflicted. When the Supreme Court in

Enemoto v. Wesley, 96 S.Ct. 1551 (1976) declined to rule on the measure of due process to be afforded prisoners who are subjected to loss of privileges on the ground that on the record before it the issue was premature, it implied that the issue was still open, and its consideration has not been foreclosed by the Wolff dictum, 96 S.Ct. at 1560. This Court agrees, Mawhinney v. Henderson, No. 76-2028 (2nd Cir. August 30, 1976) sl. op. 5284.[2]

In contrast to the prisoners in Enemoto, the Plaintiffs were subject to the specified punishment alleged in the complaint. Each was keeplocked for periods of up to ten days for offenses ranging from carrying thermos bottle of hot water, to carrying a unwrapped brief case. In each case the Adjustment Committee procedures violated the Wolff standards. Had Judge Port not dismissed the action sua sponte,[3] and had he permitted Appellants to develop a full record, they would show that the conditions suffered by a prisoner in keeplock resulted in a deprivation of the liberty retained by him sufficient to warrant the protection of the Fourteenth Amendment due process clause.

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2. In Mawhinney the State argued Appellants' position, that this Court's decisions in Crooks v. Warne, 516 F.2d 837 (2 Cir., 1975) and U.S. Ex. Rel. Larkins v. Oswald, 510 F. 2d 583 (2 Cir. 1975) that Wolff applies to the penalty imposed here.

3. This procedure was recently disapproved by this Court in Burgin v. Henderson, 536 F.2d 501, (2 Cir. 1976) where the court reversed another dismissal by Judge Port of pro-se prisoner complaint, because the practice created "additional work for the courts which could be obviated by making a fuller record in the District Court." Id. at 502 N. 1. See also Mawhinney v. Henderson, supra. Sl. Op. 5280 N. 1.

B. Appellants are Entitled to the Protection of the Due Process Clause

The touchstone in any consideration of the application of the due process clause is the definition of liberty and the extent of the deprivation of that liberty by the state. The nature of the personal liberty retained by individuals pre-dates the constitution and derives from English common law. It has been defined by the great English commentator Blackstone:

> This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural;... 1 Blackstone Commentaries on the Laws of English 134 (Chitty Ed. 97 (W.E. Dean 1841).

This view of the liberty of the individual as an inherent natural right was crucial to the founding of the government of the United States.[4] Thus it was that the framers of the Ninth

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4. For example, the Declaration of Independence declares as a self evident truth that all persons "are endowed by their Creator with certain inalienable rights" including the right to liberty.

and Tenth Amendments recognized the State and Federal governments as the protectors of the individual's liberty, not its source.

Blackstone's basic definition of liberty has been refined over the decades to include freedom from any arbitrary restraint by the government. (See. e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972), and Stanley v. Illinois, 645 (1972). The concept was first and best expressed by Justice Harlan in his dissent in Poe v. Ullman, 367 U.S. 497, 542-3 (1961):

> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and religion' the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. (Cited cases).

> and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. (Citing Cases).

In the prison context the courts have rejected the nineteenth century notion that a prisoner is a mere slave of the state. Morales v. Schmidt, 489 F. 2d 1335, 1338 (7th Cir., 1973), and have recognized that liberty and custody are not mutually exclusive; that "liberty protected by the due process clause may - indeed must to some extent - coexist with legal custody pursuant to conviction." U.S., Ex. Rel. Miller v. Twomey, 479 F. 2d 701, 712 (7th Cir. 1973). Thus, although Justice Harlan wisely cautioned against viewing liberty as "a series of isolated points pricked out," the Supreme Court has recently stated that "the convicted felon does not forfeit all constitutional protections by reasons of his conviction and confinement in prison. He retains a variety of important rights that the courts must protect." Meachum v. Fano, 96 S. Ct. 2532 (1976), (Emphasis added), see, e.g., Procunier v. Martinez, 416 U.S. 396 (1974) (First Amendment rights), Morrissey v. Brewer, 408 U.S. 471 (1972) (due process in parole revocation) Wolff v. McDonnell, supra (due process in disciplinary proceedings), Cruz v. Beto, 405 U.S. 319 (1972) (religious freedom), Bishop v. Stoneman, 508 F. 2d 1224

(2nd Cir. 1974) (adequate medical care). These are basic rights that the individual had in free society and that he carries with him into prison. They are not granted by the state once he is incarcerated. In short, although a prisoner is deprived of the power to move himself about in free society, "to whatsoever place [his] inclination may direct" Blackstone, supra, Meachum v. Fano, supra, 96 S. Ct. at 2538, within the confines of the prison he retains a sufficient quantum of liberty to give him "power of loco-motion, of changing situation... without [further] imprisonment or restraint..." Blackstone, supra. Any dimunition of that remaining quantum of liberty invokes the due process clause.

In the context of prison disciplinary proceedings, Wolff, teaches that the deprivation of liberty, i.e., a restriction on the ability to move about within the prison, sufficient to warrant procedural safeguards occurs when: 1) there is a major change in the conditions of confinement imposed, 2) as a punishment for a proven major act of misconduct. Id. 418 U.S. at 571-72 N. 19. New York State defines minor misconduct as that "which does not involve danger to life, health, security or property" and which may be dealt with "by counseling, warning and/or reprimanding the inmate," 7 N.Y.C.R.R., 251.5 (a). New York does not define major misconduct, however, the National Advisory Commission on Criminal Standards and Goals (1973) definition of minor violations is

similar to New York's, Standard 2.12, and its definition of major violations is suited to New York's scheme:

> Major violations of rules of conduct are those punishable by sanctions more stringent than those for minor violations, including but not limited to, loss of good time, transfer to segregation or solitary confinement, transfer to a higher level of institutional custody or any other change in status which may tend to affect adversely an offender's time of release of discharge.

New York's Admustment Committee has the power to place an inmate in segregation 7 N.Y.C.R.R.252.5 (e) (3) or to transfer him to a higher level of custody, i.e., confinement to his cell for up to two weeks, 7 N.Y.C.R.R., 252.5 (e) (2). It does not help the State to say that the Adjustment Committee "shall not direct the action it takes toward the objective of imposing punishment for a violation" 7 N.Y.C.R.R. 252.5 (b) because, in evaluating the deprivation suffered by the prisoner, the Court must look behind the label "punitive" or "adjustment" to the actual consequences of the action.[5] Newkirk v. Butler, 499 F.2d 1314 (2nd Cir., 1974) vac. as moot sub. nom., Preiser

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5. The consequences of Adjustment Committee action are punitive (see Post pp. 11-12). Punishment without an adjudication of guilt violates basic due process and is cruel and unusual, C.F. Johnson v. Glick, 481 F.2d 1028 (2nd Cir., 1973). Thus the regulation permitting such action is unconstitutional on its face.

v. Newkirk, 422 U.S. 395 (1975), Allen v. Nelson, 354 F. Supp. 505, 511 (N.D., Cal., 1973). To distinguish among labels only invite confusion and unnecessary litigation over the real as opposed to the ostensible motive for the State's action. As a District Court said in Kessler v. Culp., 372 F. Supp. 76, 77 (D., Ore. 1973):

> Affixing a label to determine the outcome may well also mask or conceal the interests involved. An identification of those interests is vital if they are to be protected from grievous harm or loss.

Adopting this approach the District Court in Crooks v. Warne, S.D.N.Y. Docket No. 74 Civ. 2351 (CLB, Jr.) (Oct. 1, 1974), vac. on other grounds 516 F.2d 837 (2nd Cir., 1975) found that "inmates of Bedford Hills are not customarily haled for before the Adjustment Committee and placed in segregation solely for "correctional treatment goals"(Wolff, supra), in the absence of objective miscondjct..." Sl. Op. 10, and required procedural safeguards before the Adjustment Committee could impose segregation on an inmate. On remand Appellants will show that the Adjustment Committee functions similarly at Auburn. It only acts in cases of major misconduct (N.A.C. Standard 2.12), and imposes deprivations of liberty sufficient to invoke the Wolff procedures. Cf. Mawhinney v. Henderson, supra.

At the trial of the action, Appellants will prove the conditions suffered by an inmate keeplocked as the result of Adjustment Committee action. He is kept at a higher level of

of institutional custody than inmates in the general population. That is, he is deprived of the ability to move about within the prison population. He spends twenty-three hours a day locked in his cell, being allowed out only for an exercise period and a shower. He must eat in his cell. He cannot attend religious services, use the law library or participate in rehabilitative programs or his normal work assignment. Except for physical location, the conditions of his confinement are ientical to those of a prisoner in segregation.

Even before Wolff many courts have held that confinement under these conditions warrants procedural sefaguards. Thus in U.S. Ex. Rel. Walker v. Mancusi, 338 F. Supp. 311, 313 (W.D., N.Y. 1971) prisoners who were confined in their cells twenty-three hours a day, had to eat in their cells, and could not work at institutional jobs were held entitled to the protections mandated by Sostre v. McGinnis, 442 F. 2d 178, 194-199 (2nd Cir., 1971), the then prevailing standard. See also U.S. Ex. Rel. Robinson v. Mancusi, 340 F. Supp. 662 (W.D., N.Y. 1972). Accordingly, before the prisoner's liberty may be restricted to the extent alleged here, he must be given a hearing that comports with the Wolff mandate.

New York's Adjustment Committee fall[illegible] short of that standard. There is no provision for written or oral advance notice of the charges. The prisoner is not given the opportunity to present witnesses or evidence in his own behalf. The

inmate's only participation in the process is when he is interviewed by the Adjustment Committee and asked to explain his actions. 7 N.Y.C.R.R. 252.3(e) and (f). The Committee acts summarily and the prisoner is never notified in writing. While this procedure may suffice if the Adjustment Committee's power is limited to reprimand or deprivation of privileges, that is for punishment of minor infractions, it is constitutionally deficient as long as the Adjustment Committee has power to restrict an inmate's liberty by placing him in segregation or confining him to his cell.

POINT II

THE PUNISHMENTS METED OUT BY THE ADJUSTMENT COMMITTEE ARE DISPROPORTIONATE TO THE NATURE OF THE OFFENSES

It is settled that the imposition of solitary confinement as punishment violates the Eighth Amendment proscription against the infliction of cruel and unusual punishment if the penalty is disproportionate to the offense, or is arbitrary and capricious. Weems v. U.S., 217 U.S. 349 (1910), Roberts v. Pegelow, 313 F.2d 548, 550-51 (4th Cir., 1963), Allen v. Nelson, supra

The common denominator is whether the punishment is "related to some valid penal objective and substantial deprivations are administered with due process." Landman v. Royster, 333 F. Supp. 621, 645 (E.D., Va., 1971), Allen v.

Nelson, supra, 354 F. Supp. at 511.

Generally, the amount of time spent in solitary confinement is an important element in determining disproportionality or arbitrariness, e.g., Fullwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962), and of course individual circumstances will weigh heavily in the determination. Wright v. McMann, 460 F.2d 126, 132 (2nd Cir., 1972). However, those are not the only factors to be considered. Here the deprivations of liberty inflicted on Petitioners is substantial (see ante pp.10 - 12) even though the actual time in solitary confinement is two weeks or less. The infractions which precipitated the keeplocks are probably Class C. misbehavior or less, the least serious misconduct that requires Adjustment Committee action (19) and which cannot be summarily dealt with by the charging officer. 7 N.Y.C.R.R. 251.5 (a). If they are so minor that summary action without procedural safeguards is appropriate, then keeplock is disproportionate, and the punishments inflicted are cruel and unusual. Allen v. Nelson, supra, Landman v. Royster, supra. On the other hand, if the offenses are serious enough to warrant the substantial deprivations suffered by keeplock, then the Adjustment Committee procedures run afoul of the due process clause (see Point I, ante).

CONCLUSION

At Auburn Correctional Facility, inmates may be confined to their cells for twenty-three hours a day as punishment for

disciplinary infranctions without being given the hearing required by rudimentary due process. The record, based only on the pro-se complaint is insufficient to show whether or not the conditions of that confinement are the substantial deprivations of liberty necessary to invoke Wolff. At trial in the District Court, plaintiffs will develop that record and prove the conditions when an inmate is keeplocked. Accordingly, the order of the District Court should be reversed and the matter remanded.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is tom certify that on September 16, 1976 a , copy of the within brief and the appendix was served by mail on Louis J. Lefkowitz, Attorney General of New York State at his offices at No. 2 World Trade Center New York, New York.

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